

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HENRY A. WHITFIELD, an individual,) 2:10-CV-99-ECR-PAL
Plaintiff,)
vs.) Order
PICK UP STIX, INC., a California,)
Corporation; PICK UP STIX NEVADA,)
INC., a Nevada Corporation; MARK)
BUNIM, an individual; GLENN RUTTER,)
an individual; DOES 1 through 100;)
and ROE CORPORATIONS 1 through)
100,)
Defendants.)

Plaintiff in this case is an African American male. He contends that Defendants refused to hire him because of his race. Defendants include Pick Up Stix, Inc., a California corporation and Pick Up Stix, Nevada Inc., a Nevada corporation (collectively referred to herein as "Pick Up Stix"). Defendants also include various employees of Pick Up Stix: Mark Bunim, a district operator, Gordon Keith Denman, an area supervisor and Glenn Rutter, a human resources manager.

Now pending are Pick Up Stix and Glenn Rutter's motion (#19) to dismiss and Mark Bunim and Gordon Keith Denman's motion (#30) to dismiss. Plaintiff opposed (## 20 and 22) the motions, and Defendants Pick Up Stix and Glenn Rutter replied (#21). The motions are ripe, and we now rule on them.

1 I. Factual and Procedural Background

2 The facts as alleged in the complaint are as follows: "Prior to
3 February 7, 2006, Plaintiff participated in a telephone interview
4 with Mr. Denman wherein Mr. Denman informed him that his
5 qualifications were perfect and that he simply needed to come in for
6 a 2nd interview to finalize his hiring for the position of assistant
7 manager with [Pick Up Stix]." (Compl. ¶ 19 (#1).) On or about
8 February 7, 2006, Plaintiff "was interviewed in person by Mr. Bunim,
9 Mr. Denman and Mr. Rutter for the position of assistant manager with
10 [Pick Up Stix]." (Id. ¶ 20.) During the interview "Defendants
11 visually expressed shock and outrage over Plaintiff's race." (Id. ¶
12 21.) Defendants informed Plaintiff that he was "just not what we
13 are looking for right now" and that "they had no openings for
14 assistant manager with [Pick Up Stix]." (Id. ¶ 22.) Defendants
15 subsequently hired "less qualified, non-African American individuals
16 for the position of assistant manager." (Id. ¶ 23.)

17 On January 22, 2010, Plaintiff filed the complaint (#1) in the
18 present lawsuit. On March 31, 2010, Defendants Pick Up Stix and
19 Glenn Rutter filed a motion (#21) to dismiss. Plaintiff opposed
20 (#20) the motion, and Defendants replied (#21). On June 23, 2010,
21 defendants Mark Bunim and Gordon Keith filed a motion (#30) to
22 dismiss. Plaintiff opposed (#32) the motion.

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24 II. Motion to Dismiss Standard

25 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be
26 granted if the complaint fails to "state a claim to relief that is
27 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,
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1 570 (2007). On a motion to dismiss, "we presum[e] that general
2 allegations embrace those specific facts that are necessary to
3 support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555,
4 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889
5 (1990)) (alteration in original). Moreover, "[a]ll allegations of
6 material fact in the complaint are taken as true and construed in
7 the light most favorable to the non-moving party." In re Stac
8 Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996) (citation
9 omitted).

10 Although courts generally assume the facts alleged are true,
11 courts do not "assume the truth of legal conclusions merely because
12 they are cast in the form of factual allegations." W. Mining
13 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,
14 "[c]onclusory allegations and unwarranted inferences are
15 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89
16 F.3d at 1403 (citation omitted).

17 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
18 normally limited to the complaint itself. See Lee v. City of L.A.,
19 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on
20 materials outside the pleadings in making its ruling, it must treat
21 the motion to dismiss as one for summary judgment and give the non-
22 moving party an opportunity to respond. Fed. R. Civ. P. 12(d);
23 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A
24 court may, however, consider certain materials – documents attached
25 to the complaint, documents incorporated by reference in the
26 complaint, or matters of judicial notice – without converting the
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1 motion to dismiss into a motion for summary judgment." Ritchie, 342
2 F.3d at 908.

3 If documents are physically attached to the complaint, then a
4 court may consider them if their "authenticity is not contested" and
5 "the plaintiff's complaint necessarily relies on them." Lee, 250
6 F.3d at 688 (citation, internal quotations, and ellipsis omitted).
7 A court may also treat certain documents as incorporated by
8 reference into the plaintiff's complaint if the complaint "refers
9 extensively to the document or the document forms the basis of the
10 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
11 adjudicative facts or matters of public record meet the requirements
12 of Fed. R. Evid. 201, a court may judicially notice them in deciding
13 a motion to dismiss. Id. at 909; see Fed. R. Evid. 201(b) ("A
14 judicially noticed fact must be one not subject to reasonable
15 dispute in that it is either (1) generally known within the
16 territorial jurisdiction of the trial court or (2) capable of
17 accurate and ready determination by resort to sources whose accuracy
18 cannot reasonably be questioned.").

19 20 III. Discussion

21 Defendants challenge all of Plaintiff's claims. We will
22 examine each claim in turn.

23 A. Race Discrimination

24 Plaintiff's first claim for relief asserts that he has been the
25 victim of purposeful discrimination. Specifically, Plaintiff
26 alleges that he was not hired because of his race in violation of
27 Title VII of the Civil Rights Act of 1967, 42 U.S.C. §§ 2000(e) -

1 2000(e)-17 (1982) ("Title VII"). Defendants contend that Plaintiff
2 fails to state a claim for race discrimination. Defendants also
3 contend that Plaintiff cannot bring a Title VII suit against the
4 individually named defendants.

5 Title VII makes it unlawful for an employer "to fail or refuse
6 to hire or to discharge any individual, or otherwise to discriminate
7 against any individual with respect to his compensation, terms,
8 conditions, or privileges of employment, because of such
9 individual's race, color, religion, sex, or national origin[.]" 42
10 U.S.C. § 2000e-2(a)(1). A prima facie claim for failure to hire
11 based on race requires a plaintiff to show: "(i) that he belongs to
12 a racial minority; (ii) that he applied and was qualified for a job
13 for which the employer was seeking applicants; (iii) that, despite
14 his qualifications, he was rejected; and (iv) that, after his
15 rejection, the position remained open and the employer continued to
16 seek applicants from persons of complainant's qualifications." See
17 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

18 Plaintiff states a claim against Pick Up Stix. Plaintiff
19 alleges that he is African American. He further alleges that he was
20 qualified for the position of assistant manager with Pick Up Stix.
21 Finally, Plaintiff alleges that he was not hired. Instead, Pick Up
22 Stix hired less qualified individuals who were not African American.
23 Plaintiff's allegations suffice to put Pick Up Stix on notice of the
24 nature of this claim.

25 Individual defendants, however, cannot be held liable for
26 damages under Title VII. Miller v. Maxwell's Intern. Inc., 991 F.2d
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1 583, 587 (9th Cir. 1993). Plaintiff's first claim will therefore be
2 dismissed as to the individual defendants named in this lawsuit.

3 B. Harassment

4 Plaintiff's second claim alleges harassment under Title VII.
5 To maintain a claim under Title VII for harassment, a Plaintiff must
6 show that: 1) he was subjected to verbal or physical conduct of a
7 racial nature, 2) this conduct was unwelcome, and 3) the conduct was
8 sufficiently severe or pervasive to alter the conditions of the
9 victim's employment and create an abusive working environment. See
10 Fuller v. City of Oakland, Cal., 47 F.3d 1522, 1527 (9th Cir.
11 1995) (internal quotation marks and citation omitted). Plaintiff's
12 allegations do not support a Title VII claim for harassment.
13 Plaintiff was never employed by Pick Up Stix. Therefore, he could
14 not have been subjected to an abusive working environment.
15 Plaintiff's second claim will therefore be dismissed.

16 C. Intentional and Negligent Infliction of Emotional Distress

17 Plaintiff's third and fourth claims for relief allege
18 intentional and negligent infliction of emotional distress,
19 respectively. Under Nevada's applicable statute of limitations,
20 Plaintiff had two years from February 2006 to file these tort
21 claims. See Orr v. Bank of America, NT & SA, 285 F.3d 764, 780-81
22 (9th Cir. 2002) (citing NEV. REV. STAT. § 11.190(4)(e) (2001)); NEV.
23 REV. STAT. § 11.190(4)(e) (2001) (providing a two-year limitations
24 period for "an action to recover damages for injuries to a person
25 . . . caused by the wrongful act or neglect of another"); Arnold v.
26 United States, 816 F.2d 1306, 1312-13 (9th Cir. 1987) (noting that
27 filing a Title VII claim does not toll the limitations period for
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1 tort claims). Plaintiff did not file the present lawsuit until
2 January 22, 2010, almost two years after the limitations period
3 expired. Plaintiff's third and fourth claims are thus time barred
4 unless equitable tolling applies.

5 There are several factors a court should consider in
6 determining whether the doctrine of equitable tolling should apply
7 in a given case: "the diligence of the claimant; the claimant's
8 knowledge of the relevant facts; the claimant's reliance on
9 authoritative statements by the administrative agency that misled
10 the claimant about the nature of the claimant's rights; any
11 deception or false assurances on the part of the employer against
12 whom the claim is made; the prejudice to the employer that would
13 actually result from delay during the time that the limitations
14 period is tolled; and any other equitable considerations appropriate
15 in the particular case." Copeland v. Desert Inn Hotel, 673 P.2d
16 490, 492 (Nev. 1983).

17 Plaintiff argues in his opposition that the statute of
18 limitations should be tolled on various grounds. Nevertheless, it
19 is clear from the face of the complaint that Plaintiff's state-law
20 claims are time-barred and Plaintiff failed to plead any facts in
21 his complaint demonstrating an entitlement to tolling. See Wasco
22 Products, Inc. v. Southwall Technologies, Inc., 435 F.3d 989, 991
23 (9th Cir. 2006) (noting that "federal courts have repeatedly held
24 that plaintiffs seeking to toll the statute of limitations on
25 various grounds must have included the allegation in their
26 pleadings"). Therefore, we conclude that Plaintiff's state law
27 claims are time barred; they will be dismissed on that basis.

IV. Leave to Amend

Under Rule 15(a) leave to amend is to be "freely given when justice so requires." FED. R. CIV. P. 15(a). In general, amendment should be allowed with "extreme liberality." Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (quoting Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)). If factors such as undue delay, bad faith, dilatory motive, undue prejudice or futility of amendment are present, leave to amend may properly be denied in the district court's discretion. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003) (discussing Foman v. Davis, 371 U.S. 178, 182 (1962)).

In light of the liberal spirit of Rule 15, Plaintiff should have leave to amend his complaint in order to cure the claims dismissed by this Order. If Plaintiff chooses not to amend his complaint, this case will continue with respect to the claim not dismissed by this Order.

V. Conclusion

Plaintiff states a claim against Pick Up Stix for racial discrimination in violation of Title VII. Individual defendants, however, cannot be held liable for damages under Title VII. Plaintiff's first claim will therefore be dismissed as to the individually named defendants. Plaintiff does not state a claim for racial harassment. Plaintiff's second claim will therefore be dismissed. Plaintiff's third and fourth claims for relief, alleging intentional and negligent infliction of emotional distress, respectively, are barred by the applicable statute of limitations

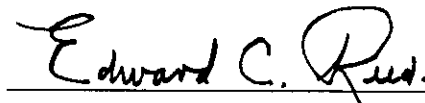
1 and are not subject to equitable tolling. These claims will
2 therefore be dismissed. Plaintiff shall have leave to file an
3 amended complaint.

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5 IT IS, THEREFORE, HEREBY ORDERED that Defendants Pick Up Stix
6 Inc., Pick Up Stix Nevada Inc. and Glenn Rutter's motion to dismiss
7 (#19) is GRANTED in part and DENIED in part on the following basis:
8 Defendants' motion is granted with respect to Plaintiff's second,
9 third and fourth claims. With respect to Plaintiff's first claim
10 for relief, the motion is denied as to Defendants Pick Up Stix, Inc.
11 and Pick Up Stix, Nevada Inc. and granted as to Defendant Glenn
12 Rutter.

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14 IT IS HEREBY FURTHER ORDERED that Defendants Mark Bunim and
15 Gordon Keith Denman's motion to dismiss (#30) is GRANTED.

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17 IT IS HEREBY FURTHER ORDERED that Plaintiff shall have 21 days
18 within which to file an amended complaint. If Plaintiff does not
19 file an amended complaint this case will proceed with respect to
20 Plaintiff's claim not dismissed by this Order.

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22 DATED: December ^{9 ECR} 8, 2010.



UNITED STATES DISTRICT JUDGE